86-954

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STEVEN MICHAEL JOHNSON
Petitioner

v.

JAMES F. TINNEY, III
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court[1] erred in concluding that the petitioner was not prejudiced by the prosecution amendment to the bill of particulars made *nunc pro tunc* on the second day of the presentation of the defendant's case in violation of his due process rights.

2. Whether the District Court[1] erred in concluding that the petitioner did not satisfy the two tests of *Strickland v. Washington* to wit, (1) that defense counsel's performance was deficient and (2) that the deficient performance so prejudiced the case as to make the result unreliable.

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[1]The United States Court of Appeals for the Fourth Circuit in its *per curiam* opinion stated that it adopted the reasoning of the United States District Court, below.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Steven Michael Johnson, petitioner, by his attorney, Charles S. Vizzini, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, decided September 9, 1986.

OPINIONS BELOW

The order from the United States District Court for the District of Maryland was by memorandum opinion with no hearing in open court on January 23, 1986.

The order from the United States Court of Appeals for the Fourth Circuit denying certificate of probable cause, dispensing with oral argument and dismissing the appeal was decided on September 9, 1986, per curiam.

JURISDICTION

Jurisdiction is invoked pursuant to Rule 20.1 of this Court and 28 U.S.C. 1254

CONSTITUTIONAL PROVISIONS INVOKED

14th Amendment of the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6th Amendment of the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

On July 11, 1980, the defendant, Steven Michael Johnson, was indicted on the following charges, to wit,

1st Count - Sexual Offense - 1st Degree
2nd Count - Sexual Offense - 2nd Degree
3rd Count - Sexual Offense - 2nd Degree
4th Count - Sexual Offense - 1st Degree
5th Count - Sexual Offense - 2nd Degree
6th Count - Sexual Offense - 2nd Degree
7th Count - Sexual Offense - 3rd Degree
8th Count - Sexual Offense - 3rd Degree
9th Count - Unnatural and Perverted Sexual Practice
10th Count - Kidnapping Child Under Sixteen
11th Count - False Imprisonment
12th Count - Assault with Intent to Disable
13th Count - Assault and Battery

He was tried without a Jury before Judge Bowling of the Circuit Court of Charles County, Maryland on October 21, 22, 1980 and found guilty of Counts 1, 10, 13.

On November 26, 1980, a Motion for a new trial was heard and denied. The defendant was thereupon sentenced to life imprisonment on Count 1 and on Count 10 for 20 years and on Count 13 for 10 years. The latter two sentences were to run concurrently with the sentence imposed for Count 1. One of the grounds stated in said Motion was the question presented in this petition.

An appeal was taken at the September Term (1981). Brief, Response and Reply were filed. The case was argued on June 18, 1981. Counsel for petitioner herein represented petitioner for the first time on that appeal and has represented him since then. On August 10, 1981, an opinion was filed denying the appeal.

Petition for Certiorari was filed in the Court of Appeals of the State of Maryland on September 24, 1981. After answer thereto, an order was filed on November 3, 1981, denying that Writ.

Thereafter petitioner filed a petition for a writ of certiorari to the Supreme Court of the United States in Docket No. 81-1230. Said petition was denied without opinion on February 22, 1982.

(The Petitioner then filed a Petition for a writ of Habeas Corpus in the United States District Court for District of Maryland which was denied in a memorandum and order entered on October 18,1982 based on the newly decided but not yet published cases of Rose v. Lundy relating to exhaustion of state remedies).

The conviction was then collaterally attacked in the Maryland state court in a post conviction proceeding in the nature of a Petition for a writ of Habeas Corpus designated as Law/no 82-477 in the Circuit Court of Charles County Maryland. After hearing in open court, it was denied. This has been the only open court hearing since the conviction and it was heard by one of the two other judges who sit in that court. Application for leave

to file an appeal was denied by the Maryland court of Special Appeal in an unreported case per Curiam opinion Johnson v. State, September term, 1985, no. 195 filed March 5, 1984, A Petition for Certiorari was subsequently denied by the Court of Appeal of Maryland in an order dated June 7, 1984.

The petitioner then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of Maryland on January 25, 1985. It was denied on January 23,1986. An appeal to the United States Court of Appeals for the Fourth Circuit was filed on April 19, and denied on September 9, 1986.

ARGUMENT

There were two grounds for the allegations of unlawful custody.

1. Error on the part of the trial court in allowing motion to amend bill of particulars in the middle of the trial so as to violate the 14th Amendment of the Constitution of the United States, as fully set forth in 2, herein. All direct appeals to Maryland courts on this issue

have been denied. The petition for a writ of Certiorari in the Supreme Court, on this issue, mentioned in the statement of the case, filed after those state appeals, was denied.

It is the petitioner's position that either the trial court erred in allowing that amendment or that his counsel erred in not asking for a short trial hiatus to investigate and marshall the appropriate alibi witnesses for the new alibi time frame after the prosecution's successful motion.

2. Ineffective assistance of counsel in violation of the 6th Amendment to the Constitution of the United States, as more fully set forth below. These allegations were the basis for the collateral attack in the state post-conviction proceeding and all state appeals therefrom.

Both issues were raised in the petition for a writ of habeas corpus filed in the United States District Court, and the appeal in the United States Court of Appeals for the Fourth Circuit.

With respect to ineffective assistance of counsel petitioner made four claims.

(a) Petitioner did not have the effective assistance of counsel because his trial counsel did not advise him to demand a change of venue so as to avoid being tried by a local jury or local judge, especially Judge Bowling.

(b) Petitioner did not have the effective assistance of counsel because he was not advised to elect a jury trial or the reasons for electing a jury trial.

(c) Petitioner did not have the effective assistance of counsel in the preparation of his alibi defense because:

(i) counsel failed to ask for a mistrial, a continuance, of short trial

hiatus to investigate and marshall appropriate alibi witnesses for the new alibi time frame when the prosecution successfully moved to amend the bill of particulars nunc pro tunc in the middle of the preparation of the defendant's case to allege that the crime occured at 3 P.M. instead of between 5:45 and 8:30 P.M.

(ii) Counsel failed to contact 4 of the alibi witnesses proferred to him by his client.

(iii) Counsel put on 2 alibi witnesses instead of the 5 that were available.

(d) The Petitioner did not have the effective assistance of counsel because he failed to ask for a change of venue.

(e) The Petitioner did not have the effective assistance counsel, because even if each of the above alleged errors acting solely were not prejudicial, all of them taken together amounted to ineffective assistance of counsel and an unfair trial.

The Fourth District Court of Appeals stated

in its opinion that it adopted the reasoning of the District Court. It is to that defective reasoning which this petition is directed.

The District Court erred in concluding that the petitioner was not prejudiced by the amendment to the bill of particulars (in violation of his due process rights).

The District Court erred in concluding that the petitioner did not satisfy the two tests of Strickland v. Washington, to wit, (1) that counsel performance was deficient, (2) that the deficient performance so prejudiced the case as to make the result unreliable.

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PETITIONER WAS NOT PREJUDICED BY THE AMENDMENT TO THE BILL OF PARTICULARS (IN VIOLATION OF DUE PROCESS RIGHTS)

It is crystal clear that the date and time of the offense was June 1, at 3 P.M. - 4 P.M. (The only question is whether the defendant committed the offense). That is the uncontradicted testimony of the complaining witness TR. TR. 47-48.

Quoted below is everything that Judge Bowling said regarding the alibi witnesses (page 385, TR. TR.).

I think that when I view the times that were testified to by the witnesses, I similarly believe, after considering all of that evidence, that some of the witnesses are confused about the date of the 31st and June the 1st, 1980. I believe that the time testified to was probably accurate for the times that some of them recall what happened, but I just feel that the two dates are confused with that in the minds of the witnesses, and I feel that the whereabouts of the defendant at the time that this could have happened is insufficiently clear to the Court to raise sufficient doubt to cause me to believe that this offense did not happen.

The trial judge never specified which of the witnesses he felt were confused about the dates and the only assumption we can make is that he was talking about those witnesses

who gave evidence concerning the relevant timeframe, i.e. 3 P.M. - 4 P.M. (otherwise the petitioners case is even stronger!).

In other words, the trial judge believed Clyde Copsey and Shirley Copsey when they said the petitioner was with them at his grandmother's party between 2:30 and 4:30 P.M. He thought they were confused about the date.

The conclusion is inescapable that had the trial judge heard from Joseph Ronald Copsey, Beverly Ann Copsey and James David Copsey, who stated they saw the petitioner at his grandmother's party between 2:30 and 4:30 P.M. on June 1, at the Post Conviction hearing that he would have realized that they were not confused as to the date. Additionally, Mary Miedzenski who was unable to attend the trial due to sickness accounted for the petitioner attendance at the June 1 party between 2 and 4:15 P.M. also, when she

testified at the post-conviction proceeding.

It is on this understanding by one judge (District Court) repeating the misunderstanding of the post-conviction judge of what the trial judge said, approved without opinion by the Court of Appeals that the whole case of due process prejudice lies. This Court should not "rubber stamp" by denying certiorari.

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PETITIONER DID NOT SATISFY THE TWO TESTS OF STRICKLAND v. WASHINGTON, TO WIT, (1) THAT COUNSELS PERFORMANCE WAS DEFICIENT AND (2) THAT THE DEFICIENT PERFORMANCE SO PREJUDICED THE CASE AS TO MAKE THE RESULT UNRELIABLE.

The petitioner is asking this court to tell the bar that the standard of good trial criminal practice is that when you have alibi witnesses you call all of them until the point is conceded.

Defense counsel had 5 alibi witnesses, ready, willing and able to testify. He called 2 of them. The reason he did not call Joseph Ronald Copsey, Beverly Ann Copsey or James David Copsey was because he felt that two alibi witnesses were enough. (PC. TR. 43, line 24 to PC. TR. 44, line 15)!

One of the most fundamental rules of the trial practice is that no witness becomes redundant until opposing counsel concedes the point attempted to be proved by stipulation or otherwise. Where a defendant is facing life imprisonment you call every alibi witness you have! That is simple common sense.

(When you add Mary Miedzenski who was not able to testify at the trial because of sickness, but who did testify at post-conviction hearing there are six alibi witnesses for the 3-4 P.M. trial frame on June 1).

The two prongs of Strickland have been satisfied on this one gross error on the part of counsel (without the additional witness).

This is especially so given the almost non-existent identification (and leading questions were allowed because the child was 9 at the time of the occurrence) TR. TR. 32 line 15 to 34 line 4.

The District Court at page 5 of its opinion erred when it stated that counsel's judgment not to call redundant witnesses was cumulative and unnecessary. He cited the trial judge statement that the trial judge believed the alibi witnesses for the time frame until 4:15, but he forgot to add what

he said earlier in his opinion - that the trial judge thought those alibi witnesses were confused as to the date.

The decision not to elect a jury trial was made upon the advice of counsel (PC TR 36, lines 15-19).

The first reason for the election given to the petitioner was that the defense of alibi by almost all relatives would be more effective before a judge than a jury (PC TR 37, lines 3 to 8)!

This advice is so egregiously atrocious as to almost preclude further discussion. Although alibi is an affirmative defense, we know that the burden of proof of all of the elements never shifts. Alibi is more likely to create reasonable doubt in at least 1 out of 12 juror's minds and spread to the others (or result in a hung jury - a tactical victory for the defense) than it is likely to create a reasonable doubt in 1 out of 1

judge's mind, already hardened against such defenses by years of experience.

The only other reason given to the petitioner was that evidence and details of his previous sexually related conviction might be given to the jury (PR TR 37, lines 9-13). The fact is that even if excluded by a judge in a judge trial it is not excluded from his mind, whereas, in a jury trial, if excluded the judge never knows about it because it is discussed in a side bar or bench conference.

Details of a previous conviction are not admissible. In this case neither the details nor the fact of conviction were admitted (PR TR 44, line 16 to PC TR 45, line 2).

The petitioner was never advised of the multifold reasons in favor of a jury trial (PC TR 36, lines 3 to 13).

The petitioner had been indicted on 13 counts involving sexual and malicious acts against a minor male in a rural county in Maryland. The case was a cause celebre and reported in the newspapers (PC TR 19, Lines 9-13) in Charles County. On a previous occasion, this defendant had been before this judge who had informed him that if he ever were to go before that judge again, he would serve a long prison term. See Criminal Nos. 6745, 6744, Transcript of Sentencing Procedures, attached to Petition for Post Conviction Relief, especially page 10, lines 21-24, et seq. Petitioner testified that he told his attorney that he did not wish to have Judge Bowling hear the case (PC TR line 18-20). Petitioner further testified that he was told that Judge Bowling was all that was available and that he had to accept him (PC TR lines 20-25). This was not denied by his then counsel (PC TR 39, line 24 to PC TR 40,

line 6) and that he knew his client was uncomfortable with Judge Bowling (PC TR 40, lines 16 to 18).

A motion to recuse Judge Bowling was not made. Even if done, it would have left the petitioner with the only other locally elected Circuit Judge in the county (one later added). The remedy was to attempt to get the case out of the county. No such attempt was made. Effective assistance of counsel does not mean counsel has to be sure prejudice will result before he takes measures to avoid prejudice.

The District Courts dismissed all of the other allegations of defense counsel's errors as trial tactic, stating that counsel had some reasons.

But there is a great concern by the Supreme Court concerning the ineffective assistance of counsel. The trial bar and the public through the press have been so

informed by their Chief Justice at seminars and conventions throughout the country.

The District Court would satisfy that concern by concluding that effective assistance of counsel was rendered in a case where:

(a) Trial counsel never even tried to remove the case out of a county where it was a cause celebre to be heard before an elected trial judge.

(b) Trial counsel never advised his client about the importance of a jury trial in a mistaken identity case for which he could be imprisoned for life.

(c) Trial counsel never even tried to remove a case from a judge who had stated that the next time petitioner appeared before him, he would be put away for a long time.

(d) Trial counsel never even asked for a mistrial or continuance when the alibi time frame was changed in the middle of defendants case.

(e) Trial counsel never even talked to nor attempted to call four more alibi witnesses.

The District Court application of Strickland, supra is far too narrow. It is not a determination-outcome test. The following language in Strickland, supra, at 80 L. Ed. 2nd 674 is worth repeating.

"On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome - determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and in 10, 11. Nevertheless, the standard is not quite appropriate...The result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of evidence to have determined the outcome (Emphasis supplied)."

CONCLUSION

Judges and lawyers have a dual responsibility in assuring that due process and effective assistance of counsel are achieved. It is for this reason, in the public interest as well as for all of the arguments stated above that a full hearing should be held on the matter and a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted

Charles S. Vizzini
Attorney for the Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEVEN MICHAEL JOHNSON	*	
v.	*	CIVIL NO. Y-85-324
JAMES P. TINNEY, Warden, et al.	*	

MEMORANDUM

On October 22, 1980, after a court trial before Judge George W. Bowling in the Circuit Court for Charles County, Maryland, Steven Michael Johnson was found guilty of a sexual offense in the first degree, kidnapping, and assault and battery, and eventually sentenced to life in prison. Having exhausted his remedies in the courts of Maryland, Johnson has petitioned this Court for habeas corpus relief, alleging that his trial denied him several constitutional rights. The Court has extensively reviewed the transcripts of his trial and the records of proceedings pursuant

to his motions for a new trial and for post-conviction relief. Finding no merit in petitioner's allegations of constitutional error, and the verdict more than "fairly supported [ed]" by the record, the Court will deny the writ.

The state of Maryland sought to prove that Johnson abducted nine-year-old Roger Miller on Sunday, June 1, 1980, forced Roger into a car and drove his to a deserted spot where, after several episodes of sexual abuse, Johnson strangled Roger into unconsciousness. A passing motorist found Roger at approximately 8:00 p.m.

In a bill of particulars provided the defendant before trial, the state alleged that the crimes occurred between 5:45 and 8:00 p.m. On the first day of trial, Roger Miller gave testimony to the effect that the crimes could have occurred as early as 3:00 p.m. The defense began to put on its case the afternoon of the first trial day. The

next morning the state moved to amend the bill of particulars to allege that the crime occurred between 3:00 and 8:00 p.m., and the court granted the motion over the objection of Johnson's counsel. On direct appeal Johnson argued that the amendment in the midst of trial voilated his due process rights. During the post-conviction proceedings, Johnson argued that his counsel's failure to move for a continuance or to call additional alibi witnesses voilated his right to effective assistance of counsel.

All of Johnson's arguments on this point must fail because, in a detailed, well-written opinion denying Johnson's petition for post-conviction relief, Associate Judge Richard J. Clark of the Seventh Judicial Circuit made a finding that Johnson was not prejudiced by the amendment to the bill of particulars. Johnson v. Tinney, Criminal No. 7357 (Circuit Ct. for Charles Co., Nov. 17, 1983), memo op. at 8-10 (attached as exhibit 9 to defendant's

motion to dismiss). Under 28 U.S.C. §2254(d), this Court must accord a "high measure of deference" to state court findings, unless they lack even "fair support" in the record. Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

There is far more than "fair support" in the record for Judge Clark's finding. Johnson essentially called two batteries of alibi witnesses. Two witnesses, Clyde and Shirley Copsey, testified that Johnson had been at a birthday party for his grandmother until approximately 4:15 p.m. The remaining defense witnesses testified to Johnson's activities from approximately 6:00 to 10:00 p.m. As Judge Clark found, it was apparent from Judge Bowling's oral opinion at the conclusion of the case that the trial judge believed the witnesses who testified that Johnson was at his grandmother's party until 4:15. The judge did not believe that some of the witnesses were confusing the events on the

date of the crime with events of the previous night, Saturday, May 31.

Johnson claims that his due process rights were violated by the amendment to the bill of particulars because he could have called additional alibi witnesses who would have testified that he was at the party. Johnson also claims that he was denied effective assistance of counsel when his lawyer failed to request a continuance in order to procure the testimony of those additional witnesses. But Johnson does not claim that the amendment impaired his alibi defense for the crucial time period after he left the party. Nor has Johnson alleged that his counsel failed to call a witness who would have testified to his whereabouts after 4:15. In the absence of such a showing by Johnson, there is clear support in the record for Judge Clark's finding that Johson was not prejudiced by the amendment to bill of

particulars, or by his counsel's failure to call additional alibi witnesses.

Without a showing of prejudice, Johnson cannot satisfy the second prong of the test for ineffective assistance of counsel claims established by the Supreme Court in Strickland v. Washington, _____ U.S. _____, 52 U.S.L.W. 4565, 4572 (May 14, 1984). The Supreme Court required a convicted defendant to establish "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability sufficient to undermine confidence in the outcome."

Nor does counsel's failure to call additional alibi witness or to request a continuance for that purpose satisfy the first prong of Strickland. The Supreme Court held that a convicted defendant must prove that counsel's performance was actually deficient in some way. 52 U.S.L.W. at 4570. In this case, the trial judge explained in his oral opinion

that he believed the alibi testimony that Johnson was at his grandmother's party until 4:15, bearing out counsel's judgment that additional testimony on that point would have been cumulative and unnecessary.

Johnson also claims that he was denied effective assistance of counsel by his lawyer's advice to request a court trial as opposed to a jury trial. Johnson's attorney, Theodore P. Weiner, testified at Johnson's post-conviction hearing in front of Judge Clark that before trial he had advised Johnson to elect a court trial. "My consideration were that if the young boy, I think who was 9 years old at the time, identified Steven [Johnson] at the time of the trial that a jury would turn their ears off and cease to listen to any further evidence and certainly wouldn't listen to an alibi defense, which was comprised almost totally of his relatives. In addition, even though I think there was a plea of assault and battery, the other offense Steven had been convicted of possibly

would have been entered or discussed or [sic] cross examination, and which I think would have worked a prejudice to him particularly in front of a jury."

Transcript of proceeding for post-conviction relief, March 24,1983, p. 37 (attached as exhibit 8 of defendant's motion to dismiss).

At page 10 of his petition to this Court, Johnson says that Weiner's advice was "so egregiously atrocious as to almost preclude further discussion." Johnson claims that a defendant relying on an alibi should always choose a jury trial, because the alibi "is more likely to create reasonable doubt in at least 1 out of 12 juror's minds and spread to the others (or result in a hung jury--a tactical victory for the defense) that it is likely to create a reasonable doubt in 1 out of 1 judge's mind, already hardened against such defenses by years of experience." The Court cannot agree with Johnson's sweeping argument. There are many situations in which a defendant, even one relying on an alibi

defense, might prefer a court trial over a jury trial.

The Court also notes that Johnson's argument ignored the main reason that Weiner advised Johnson to elect a court trial--his fear of the prejudical impact upon a jury of an in-court identification by a 9 year-old victim of a brutal crime. In his reply to the state's motion to dismiss, Johnson argues that the victim's in-court identification "was virtually non-existent." Johnson quotes at length from the transcript of the trial to prove his point. The transcript of the victim's identification of Johnson illustrates the wisdom in the "highly deferential" standard of review this Court must apply in evaluating the trial court's finding that the identification was credible. Words on a page cannot convey what actually happened in the trial court when the prosecutor asked 9-year-old Roger Miller to look around the courtroom for the man who had abducted him and molested him. The transcript cannot convey

Roger's expression or his tone of voice when his eyes finally fixed on the defendant and he said, "He didn't have a mustache." The Court also notes that defense counsel could not know in advance of trial how strong the in-court identification would be, and wisely prepared for the worst.

Weiner testified that Johnson did not have a strong preference for either court or a jury trial, and agreed to follow Weiner's advice. Transcript of post-conviction relief proceedings at 39. Weiner also testified that the defense did not know who the trial judge would be until the day trial, when Judge Bowling was assigned to the case. Transcript at 41.

Eight months earlier, Judge Bowling had accepted Steven Johnson's plea of guilty to a charge assault. The charge arose out of an incident that occured in 1979, when Johnson, claiming to be a police office, ordered two young men out of a car at rifle point. Johnson then frisked the two men, and made

sexual contact with one of them. The State agreed to let Johnson plead guilty to an assault charge, instead of to a fourth degree sexual offense. In the course of the sentencing proceeding Judge Bowling warned Johnson: "that type of activity cannot and will not be tolerated and if is happens at any future time, Mr. Johnson, you have got a long period of confinement looking you in the face."

Johnson told his attorney about the sentencing proceeding before Judge Bowling. At the post-conviction proceedings attorney Weiner remembered Johnson's discomfort with Judge Bowling. Weiner testified: "I told [Johnson] in my opinion, my experience with Judge Bowling is that he was a very fair minded and open minded judge and would not prejudge his case, but there is no question that Steve, before the trial, made clear that he had a preference against Judge Bowling hearing that." Transcript at 40. Acting on his attorney's advice, Johnson

waived his right to a jury trial in open court, under voir dire from Judge Bowling.

Evaluating this ineffective assistance claim under the standards articulated in Strickland v. Washington, supra, the advice to elect a court trial clearly was not deficient In Strickland, the Supreme Court held that "Judicial scrutiny of counsel's performance must be higly deferentioal, "52 U.S.L.W. at 4571, and that the defendant must overcome a presumption that under the circumstances the challenged action might be considered sound trial strategy. Id. In his opinion denying Johnson's petition for post-conviction relief, Judge Clark found that the decision to proceed with a court trial, even in front of Judge Bowling, involved "trial tactics." Johnson v. Tinney, supra, memo op. at 5. According to "high measure of deference" to that finding, the Court finds more than "fair support" in the record for it. Marshall v Lonberger, supra, 459 U.S. at 432.

Attorney Weiner testified at Johnson's post-conviction hearing that he advised Johnson to elect a court trial because he feared that prejudicial impact upon a jury of an in-court identification by a 9-year-old victim. Weiner testified that he continued in that advice even after Judge Bowling was assigned to the case because he was familiar with Judge Bowling, and believed that Judge Bowling "was a very fair minded and open minded judge" who would not prejudge Johnson's case. Such considerations clearly fall into the realm of trial tactics, and this Court does not find that Weiner's advice to his client fell outside "the wide range of professionally competent assistance." Strickland, supra, 52 U.S.L.W. at 4571.

Johnson also claims that he was denied effective assistance because his lawyer did not ask Judge Bowling to recuse himself, or move for a change of venue. Weiner's failure to move for a change of venue was not deficient in any way. Attorney Weiner was under no professional obligation to file futile

motions, and a motion for change of venue would have been futile. Johnson argues that a change of venue was appropriate because the assault on Roger Miller was a "cause celebre" in Charles County, Maryland. But Johnson's argument is dependent on the assumption that Weiner should have advised Johnson to elect a jury trial. The Court has already held that Weiner's advice to opt for a court trial instead was not deficient performance. Once that decision was made, Johnson was not entitled to a change of venue. Maryland's constitutional provision on "Removal of causes," Art. IV, § 8, is directed only to the dangers that local juries might be prejudiced against the defendant, and does not carry with it the right to have a different judge preside at the trial. Johnson v. State, 258 Md. 597 (1970), modified on other grounds, 408 U.S. 937 (1972).

The Court cannot hold that Weiner's failure to move for Judge Bowling to recuse himself fell outside "the wide range of

professionally competent assistance," either. Judges are under an independent ethical obligation to recuse themselves from cases they cannot decide fairly. It cannot be professionaly deficient for an attorney to rely on the integrity of the courts.

Even assuming that Weiner's performance was deficient in any of these ways, Johnson has also failed to satisfy the second prong of the Strickland test. He has made no showing "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." 52 U.S.L.W. at 4572. Johnson did not call Judge Bowling during his post-conviction proceeding, and has made no showing to this Court that Judge Bowling would have granted a motion to recuse. Judge Bowling's personal decision to try the case creates a strong presumption that a motion to recuse would have been futile.

Nor has Johnson made any showing to this Court that the decision in his case would have been any different if Johnson had been tried before a jury from Charles County, a jury from outside Charles County, or a different judge. The only concrete example of prejudice Johnson offers is the transcript of Judge Bowling's remarks when he sentenced Johnson on the prior assault charge eight months before. The sentencing proceeding considered as a whole simply does not support a claim of prejudice. In that proceeding, Judge Bowling sentenced Johnson to one year in prison, and suspended the entire sentence. The sentence imposed on that occasion indicates that Judge Bowling's primary concern was Johnson's rehabilitation, and indicates a genuine reluctance to punish Johnson even though Johnson had engaged in clearly unacceptable and potentially dangerous behavior. Judge Bowling's warning that Johnson faced considerable time in jail if he repeated his behavior was typical of

the lectures judges give at sentencings, and especially typical of lectures given to first offenders who receive suspended sentences. Johnson has made no showing that the lecture was not typical for Judge Bowling.

Johnson has not culled any specific examples of prejudice on the part of Judge Bowling from the record of his trial. This Court made an independent review of the record and found that Judge Bowling's conduct of the trial and final decision were even-handed and well-considered.

After the trial before him, Judge Bowling found Johnson guilty beyond a reasonable doubt and to a moral certainty. That judgment is entitled to a "high measure of deference." This Court finds the verdict more than fairly supported in the record, and finds nothing in petitioner's allegations of ineffective assistance to "undermine confidence in the outcome." Strickland, supra, 52 U.S.L.W. at 4572.

Finally, Johnson argues that the cumulative effect of all the errors he alleges denied him a fair trial. No prejudice plus no prejudice equals no prejudice. Accordingly, Johnson's petition for a writ of habeas corpus is denied.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEVEN MICHAEL JOHNSON *

v. * CIVIL NO. Y-85-324

JAMES P. TINNEY, Warden, et al. *

ORDER

In accordance with the attached Memorandum, it is this 23rd day of January, 1986, by the United States District Court for the District of Maryland, ORDERED:

1. That the peition BE, and the same IS, hereby DENIED:

2. That judgment BE, and the same IS, hereby ENTERED in favor of the defendant; and

3. That a copy of this Memorandum and Order be mailed to petitioner and counsel.

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 86-6558

Steven Michael Johnson,

Appellant,

versus

James P. Tinney, Warden,
Maryland Correctional
Institution,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge. (C/A No. Y-85-324)

Submitted: April 22, 1986

Decided: September 9, 1986

Before WIDENER, PHILLIPS and ERVIC, Circuit Judges.

(Charles S. Vizzini; Bert Kapinus for Appellant. Stephen H. Sachs, Attorney General; Richard B. Rosenblatt, Assistant Attorney General, for Appellee.)

PER CURIAM:

A review of the record and the district court's opinion discloses that an appeal from its order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254 would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court. Johnson v. Tinney, C/A Nos. Y-85-324 (D. Md., Jan. 23, 1986).

DISMISSED.